COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1704 **Cir. Ct. No. 2011CV16419**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL. JOHN R. CHIC,

PETITIONER-APPELLANT,

V.

BRIAN HAYES , DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. John R. Chic, *pro se*, appeals an order of the circuit court denying his motion for clarification. Chic alleged the existence of a "latent ambiguity" in an earlier order that resolved his petition for *certiorari* review of a

probation revocation by remanding the matter to the Division of Hearings and Appeals.[1] The circuit court rejected his claim, and we affirm.

BACKGROUND

¶2 In Milwaukee County case No. 1991CF912506, Chic was convicted in 1992 of first-degree sexual assault and attempted first-degree sexual assault, both by threat of use of a dangerous weapon. As to count one, first-degree sexual assault, the circuit court imposed a fifteen-year prison sentence. As to count two, the circuit court imposed a consecutive, eight-year prison sentence, but stayed it in favor of a seven-year term of probation. Chic completed his prison sentence on count one in 2007. Underlying the instant appeal is Chic's effort to challenge an administrative decision revoking his probation on count two.

¶3 The Department of Corrections began proceedings to revoke Chic's probation in April 2011, alleging that Chic violated the rules of his community supervision in numerous ways. An administrative law judge conducted a revocation hearing on July 13, 2011. Chic, who was represented by counsel at the proceeding, stipulated that he engaged in the conduct alleged but contended that the Department of Corrections lacked jurisdiction over him. He claimed that he had served his seven years of probation on count two concurrently with his fifteen-year prison sentence on count one, and his probation therefore had expired. In support, he relied on the original judgment of conviction, which does not expressly

[1] We have substituted Brian Hayes for David Schwarz as the respondent Administrator of the Division of Hearings and Appeals. *See* WIS. STAT. § 803.10(4)(a) (2013-14) (automatic substitution of successive public officers); *see also* ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶1 n.1, 295 Wis. 2d 1, 719 N.W.2d 408. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

describe the term of probation as consecutive or concurrent. The Department of Corrections, represented by a probation agent, sought to refute Chic's claim with an uncertified excerpt from the transcript of Chic's sentencing hearing showing that the probationary term was consecutive. The transcript excerpt provides, in pertinent part:

> [The Prosecutor]: Your Honor, on Count 2, on the probation, is that consecutive?
>
> The Court: It's consecutive.
>
> [The Prosecutor]: Consecutive to Count 1?
>
> The Court: Yeah.

Chic argued that an uncertified partial transcript was insufficient to prove the structure of his probation. He further contended that the absence of language in the judgment of conviction expressly stating that the probationary term was consecutive meant that the probation was imposed as a concurrent term.

¶4 The administrative law judge ruled that it would hold the record open until August 5, 2011, to permit Chic's probation agent to file "a judgment clarifying the court's intent" or "whatever the department is going to submit" to demonstrate that Chic remained on probation and subject to the agency's jurisdiction. On July 14, 2011, the probation agent submitted an amended judgment of conviction signed and entered by the clerk of circuit court that day. The amended judgment expressly described the probationary term as consecutive.

¶5 Chic objected to the submission, contending that the amended judgment of conviction was a nullity because the clerk entered it without judicial authorization. *See* ***State v. Prihoda***, 2000 WI 123, ¶26, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that "[t]he office of a clerk of circuit court may not correct a

clerical error in the sentence portion of a written judgment of conviction independent of the circuit court"). The administrative law judge concluded, however, that it had "no authority to ignore a facially valid court order." Accordingly, the administrative law judge determined that Chic remained on probation and that the department had jurisdiction over him.

¶6 The administrative law judge ordered Chic's probation revoked. Chic appealed to the Administrator of the Division of Hearings and Appeals, who affirmed the administrative law judge. Chic then petitioned the circuit court for *certiorari* review, asserting that the amended judgment of conviction was invalid, the uncertified transcript excerpt was insufficient to demonstrate that he remained on probation, and the Department of Corrections thus lacked jurisdiction over him.

¶7 The circuit court resolved the matter with a written decision entered on November 19, 2012. In the circuit court's view, the original judgment of conviction, read in its entirety, showed that the sentencing "court intended the probation term on count two to be served consecutively."[2] The circuit court acknowledged, however, that the administrative law judge "suggested that the [original judgment of conviction] was ambiguous about count two being consecutive." The circuit court further acknowledged Chic's complaint that the clerk of circuit court did not obtain prior judicial approval before entering an amended judgment of conviction describing Chic's probation as consecutive.

[2] The original judgment of conviction states that the stayed sentence on count two is consecutive to count one, that probation is imposed, and that, as a condition of probation, Chic must "continue any treatment (psychological or otherwise) that he had been receiving while at [the prison]."

¶8 The circuit court next noted that the certified transcript submitted in opposition to Chic's petition for a writ of *certiorari* conclusively showed that the circuit court ordered a consecutive term of probation as an alternative to a consecutive sentence on count two.[3] The circuit court recognized, however, that the certified transcript was outside the record made during the administrative hearing. The circuit court determined:

> the cleanest way to complete the record in this case and give Mr. Chic the complete probation revocation hearing he deserves is to remand the proceeding to the Division of Hearings and Appeals for an administrative law judge to consider whether to amend the record to include the certified copy of the sentencing hearing transcript and consider Mr. Chic's contentions in light of the statements the [sentencing] court made about the structure of his sentences.

The circuit court then ordered: "this case is remanded to the Department of Corrections Division of Hearings and Appeals to consider the certified transcript part of the file."

¶9 In June 2013, Chic, proceeding *pro se*, moved for clarification of the November 19, 2012 remand order. According to Chic, the order remanding the matter to the Division contained a "latent ambiguity." In his view, the order required a *de novo* probation revocation hearing, but instead, the administrative law judge and the Administrator of the Division of Hearings and Appeals amended the record to include the sentencing transcript and then "upheld rulings already made" without conducting a full evidentiary hearing.

[3] The certified transcript contains text identical to the text in the partial uncertified transcript.

¶10 By order dated July 24, 2013, the circuit court concluded that the administrative law judge and the Administrator correctly understood the court's order: "an in-person revocation hearing was not required. [The court's] reference to a 'complete' hearing was intended merely as a reference to a complete record, that is, a record which included the sentencing transcript. Another in-person evidentiary revocation hearing was not required." On August 1, 2013, Chic filed a notice of appeal from that order.

¶11 We questioned the finality of the July 24, 2013 order. We also directed the parties to address the finality of the November 19, 2012 order. We now conclude that both orders are final. We therefore do not address the earlier order, because Chic did not timely appeal it. We affirm the later order.

DISCUSSION

¶12 We first explain why the November 19, 2012 order was a final order for appeal. A final order or judgment is one "that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding." WIS. STAT. § 808.03(1). To avoid questions about finality, circuit courts are required to include a statement on the face of a final document that it is final for purposes of appeal. *See* ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶44, 299 Wis. 2d 723, 728 N.W.2d 670. The failure to include a finality statement on a document, however, does not render a final order nonfinal. *See* ***id.***, ¶46. In this case, the circuit court did not include a finality statement on the November 19, 2012 order, but it is final nonetheless because it plainly disposes of the entire matter in litigation. Our conclusion flows from the application of long-settled principles.

¶13 Review of matters involving probation and parole revocation is by common-law *certiorari*.[4] ***State v. Bridges***, 195 Wis. 2d 254, 258, 536 N.W.2d 135 (Ct. App. 1995). A court sitting in *certiorari* may affirm or reverse, or the court may remand for limited purposes. *See* ***State ex rel. Lomax v. Leik***, 154 Wis. 2d 735, 741, 454 N.W.2d 18 (Ct. App. 1990). The circuit court here followed the latter course and ordered a remand. Following that order, nothing remained to be done in the circuit court pursuant to the petition for a writ of *certiorari*. To the contrary:

> "It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of *certiorari*." Since there are no statutory provisions for judicial review [in this case], review must be by way of *certiorari*. Thus, the circuit court could not properly review the Board's second order without a second writ of *certiorari*.
>
> Although the circuit court properly reviewed the first order, the first writ of *certiorari* did not vest the circuit court with continuing jurisdiction. Rather, the first writ merely allowed the circuit court to review the first order. Since the Board issued a second order following remand, the circuit court needed a new writ of *certiorari* to review that separate order.

State ex rel. Iushewitz v. Milwaukee Cnty. Pers. Review Bd., 176 Wis. 2d 706, 710, 500 N.W.2d 634 (1993) (citations omitted, italics added). Accordingly, the

[4] At our request, the parties discussed in their briefs whether WIS. STAT. §§ 227.56 and 227.57 shed light on the finality of the November 19, 2012 order. We agree with the State that those statutes do not aid the analysis. *See* WIS. STAT. § 227.03(4) (provisions of WIS. STAT. ch. 227 do not apply to probation revocation proceedings).

November 19, 2012 order remanding the instant matter terminated the *certiorari* proceedings in the circuit court. Any further circuit court review would require a new petition for a writ of *certiorari*. *See* ***id.*** Thus, the November 19, 2012 order was final under WIS. STAT. § 808.03(1).

¶14 Because the November 19, 2012 order was final, the deadline for Chic to file a notice of appeal to this court challenging the order fell on February 18, 2013. *See* WIS. STAT. § 808.04(1); *see also* ***Bridges***, 195 Wis. 2d at 258-59 (appeals to this court in *certiorari* proceedings governed by the deadlines in § 808.04(1)). Chic did not meet the deadline. Accordingly, he may not appeal the order. *See* Wis. STAT. RULE 809.10(1)(e) (timely notice of appeal necessary to give this court jurisdiction); WIS. STAT. RULE 809.82(2)(b) (deadline for filing a notice of appeal under § 808.04(1) cannot be extended). Moreover, Chic may not obtain review of a final order by filing a notice of appeal from a later order. *See* RULE 809.10(4) (appeal from a final order brings before the court only prior nonfinal orders adverse to the appellant and not previously appealed and ruled

upon). Thus, although Chic asserts in this appeal that the circuit court erred in its November 19, 2012 order, we lack jurisdiction to review his untimely challenges.[5]

¶15 We add that, as the State accurately points out, if Chic is dissatisfied with the *Division's* decision after remand, his remedy is to seek *certiorari* review of that decision. *See* ***Iushewitz***, 176 Wis. 2d at 710. According to the State, Chic has not exercised that remedy. Regardless, our lack of jurisdiction to review a circuit court order that Chic did not timely appeal is unaffected by Chic's other actions and inactions following expiration of the appellate deadline.

¶16 We next consider the finality of the July 24, 2013 order. The order disposed of the entire matter before the circuit court, namely, whether the November 19, 2012 order required clarification. Accordingly, we agree with the

[5] For the sake of completeness, we note that, were we to review the November 19, 2012 order, we would conclude that the issues Chic raises are moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("moot question is one which circumstances have rendered purely academic"). Chic believes the circuit court should have reversed the probation revocation decision on the ground that the Department of Corrections did not establish jurisdiction over Chic by proving he was on probation before the administrative law judge closed the record on August 5, 2011. Chic's thesis is that the administrative record lacked a complete and certified sentencing transcript showing the circuit court imposed consecutive probation, and the July 14, 2011 amended judgment of conviction showing consecutive probation was invalid because the clerk of circuit court entered the amended judgment without judicial authority, in violation of ***State v. Prihoda***, 2000 WI 123, ¶26, 239 Wis. 2d 244, 618 N.W.2d 857. The circuit court, however, subsequently entered an order validating the amended judgment of conviction *nunc pro tunc* to July 14, 2011, and we concluded that the circuit court's actions were proper. *See* ***State v. Chic***, No. 2013AP1889-CR, unpublished slip op., ¶¶3-4 (WI App July 29, 2014) (***Chic I***). Our decision in ***Chic I*** precludes further challenge to the validity of the amended judgment of conviction entered on July 14, 2011. *Cf.* ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391 ("The doctrine of issue preclusion forecloses relitigation of an issue that was litigated in a previous proceeding involving the same parties or their privies."). Therefore, pursuant to ***Chic I***, the agency record on August 5, 2011, included a valid amended judgment of conviction confirming that the sentencing court ordered Chic to serve a seven-year term of probation consecutive to his fifteen-year prison sentence. The issue is not subject to further debate.

parties that the July 24, 2013 order was final. We therefore may review it. *See* WIS. STAT. RULE 809.10(1)(e).

¶17 The July 24, 2013 order addressed Chic's allegation that the November 19, 2012 order contained a "latent ambiguity" regarding the agency's obligations on remand. Whether a judgment or order is ambiguous is a question of law. ***Estate of Schultz v. Schultz***, 194 Wis. 2d 799, 805, 535 N.W.2d 116 (Ct. App. 1995). We review questions of law *de novo*, but with the benefit of the circuit court's analysis. *See* ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

¶18 The circuit court denied Chic's motion for clarification, concluding that the administrative law judge and the Administrator correctly understood the November 19, 2012 order. The circuit court explained that the Division did everything that the circuit court required by amending the record to include the sentencing transcript and considering Chic's claim regarding the structure of his probation in light of the record. We agree. Indeed, on appeal Chic does not contend otherwise. To the contrary, he affirmatively asserts: "[t]he record also reflects that [the circuit court] remanded this case b[a]ck to the D[ivision of] H[earings and] A[ppeals] to amend the closed record, with the instruction that the [administrative law judge] 'consider' the sentencing transcript as part of the record." No uncertainty exists about the meaning of the November 19, 2012 order. Because the circuit court correctly denied Chic's motion for clarification of that order, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.